IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 189

JAMES MINOR,

Petitioner,

vs.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEX

SUBJECT INDEX

TABLE OF CASES

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ARGUMENT

The Government's Analysis of the Fifth Amendment Issue Raised by This Case Conflicts With Prior Decisions of This Court.

In its brief, the government has apparently abandoned the principle of the severability of §4705(a) upon which the Second Circuit sustained the validity of the statute in this case. Instead, it seeks to have this Court hold §4705 constitutional by arguing that the statute does not violate petitioner's privilege against self-incrimination because in its practical operation it would be unlikely that a person such as petitioner could receive the order form from a buyer.

The government does not take issue with petitioner's assertion that compliance with the order form procedure requires record-keeping. Rather, its argument is premised on the assumption that the only way an illicit seller can avoid prosecution is by not selling at all. In *Marchetti* v. *United States,* 390 U.S. 39 (1968), however, this Court rejected such a thesis stating that:

> "The Court held in *Lewis* [v. United States, 348 U.S. 419 (1955)] that the registration and occupational tax requirements do not infringe the constitutional privilege because they do not compel self-incrimination, but merely impose on the gambler the initial choice of whether he wishes, at the cost of his constitutional privilege, to commence wagering activities. The Court reasoned that even if the required disclosures might prove incriminating, the gambler need not register or pay the occupational tax if only he elects to cease, or never to begin, gambling. There is, the Court said, 'no constitutional right to gamble.' 348 U.S., at 423.
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> "We find this reasoning no longer persuasive. The question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of

the privilege have been said to have occurred. See, e.g., *Carnley* v. *Cochrane,* 369 U.S. 506. Compare *Johnson* v. *Zerbst,* 304 U.S. 458; and *Glasser* v. *United States,* 315 U.S. 60. To give credence to such 'waivers' without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation.' Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 37. We cannot agree that the constitutional privilege is meaningfully waived merely because those 'inherently suspect of criminal activities' have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither."

390 U.S. at 51-52.

The government's attempt to distinguish this case from *Marchetti* by stating that "[t]he Harrison Act does not permit an illicit transaction to be clothed with legality under federal law, even in appearance, by registration and payment of a tax" (Resp's. br. p. 12) further demonstrates the erroneousness of its position. Section 4705(a) indicates that all sales, whether made by illicit or legal sellers, can, and indeed, must be made with an order form. The government also concedes that the statute is applied in this manner (Resp's. Brief at p. 9 fn. 4). Thus, a seller, although he may be in violation of state law and other federal legislation, complies with §4705 if he sells pursuant to an order form. *Nigro* v. *United States,* 276 U.S. 332, 350-351 (1928).

The government's attempt to obviate the unconstitutional posture of the statute as written by alluding to what it conceives to be its limited practical effect is an approach that has also been rejected by the Court. In *Leary* v. *United*

States, 395 U.S. 6 (1969), the government argued that Leary would not have been permitted to register to obtain the order form to purchase marijuana because he was not a legal dealer. Therefore, concluded the government, he would have been in no danger of self-incrimination. Since the government's position in *Leary* reflected its enforcement policy, Leary would never have been permitted to register and would never have been subjected to the risk of self-incrimination.

The actual operation of the government's enforcement policy was deemed irrelevant, however, as the Court made it clear that the real issue was not whether Leary would have been permitted to register but whether the statutory scheme and the intent of Congress was to require that he register. The Court found such a requirement to exist in the statutory scheme and held that Leary was entitled to the protection of the Fifth Amendment. The same analysis necessitates the same result in this case because, again, the issue is whether strict and literal compliance with the scheme as Congress intended it to operate would require disclosure of the incriminating information. That such was Congress' intent is fully demonstrated by our analysis of the statute set forth in our main brief at pp. 11-16.

We do not concede the government's practicality argument, for there is no factual basis in the record to support it. Moreover, the government acknowledges that there are instances when the unregistered seller would obtain the order form and therefore be subject to the reporting provisions. The government's conclusion that such instances are so unlikely as to create no substantial risk of self-incrimination misses the point, for personal rights under the Fifth Amendment are not dependent on the fortuitousness of the frequency of violation.

Even assuming the government's point, the situation is not significantly different from the *Marchetti* series of cases. Illegal gamblers, illegal possessors of firearms, and illegal buyers of marijuana as a practical matter did not register under the relevant statutes, *Leary* v. *United States, supra,* 395 U.S. at 25, yet the Court held that Fifth Amendment rights were applicable and endangered.

The government's last assertion is that petitioner cannot claim a violation of his Fifth Amendment rights because he received no order form (Resp. brief pp. 12-13)—a position that is inconsistent with the principle that one who receives the order form is subject to the record-keeping provisions and, therefore, must reveal information which is incriminating. Once again, the fallacy in the government's position is apparent from the fact that neither Leary, Marchetti, Haynes or Grosso registered under the statute pertinent to their respective cases. Yet, the Court permitted the defense of self-incrimination to bar conviction in each case stating in *Leary* that:

> "The aspect of the self-incrimination privilege which was involved in *Marchetti,* and which petitioner asserts here, is not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act. Thus, petitioner is . . . [asserting] that he cannot be convicted for having failed to comply with the transfer provisions of the Act at the time he acquired marijuana in 1965. His admission at trial that he had indeed failed to comply with the statute was perfectly consistent with the claim that that omission was excused by the privilege. Hence, it could not amount to a waiver of that claim."
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> 395 U.S. at 28.

Conclusion

For the above-stated reasons, the judgment should be reversed.

Respectfully submitted,

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Dated: October, 1969